

## U.S. Department of Labor's New Proposed Fiduciary Guidance Impacts IRA Rollover Advice and Legacy PTEs

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On October 31, 2023, the United States Department of Labor's Employee Benefits Security Administration (the Department) released its most recent proposed amendment to the guidance addressing when a person would be considered a fiduciary under Title I and Title II of the Employee Retirement Income Security Act of 1974 (ERISA) if it provides investment advice or makes an investment recommendation to a retirement investor.

The Department proposes that a person would be a fiduciary under Title I and Title II of ERISA if

- the person provides investment advice or makes an investment recommendation to a retirement investor (i.e., a plan, plan fiduciary, plan participant or beneficiary, Individual Retirement Account (IRA), IRA owner, beneficiary, or IRA fiduciary);
- the advice or recommendation is provided "for a fee or other compensation, direct or indirect," as defined in the proposed rule; and
- the person makes the recommendation in one of the following contexts:
  - The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;
  - The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
  - The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

The Department's attempts to issue this guidance have been unsuccessful historically, and this new proposed rule has many of the same characteristics as previous Department rules and guidance. For example, this new proposed fiduciary definition would apply to recommendations to roll over assets from a workplace retirement plan to an IRA. This type of advice is typically provided on a one-time basis. This is where the Department and investment advisers

have disagreed in the past. Investment advisers, who did not provide guidance regularly to an investor, did not agree that this one-time interaction resulted in the adviser assuming fiduciary status. The Department's prior guidance regarding the "regular basis" test has been successfully challenged.

[see <https://www.winston.com/en/insights-news/dol-issues-new-fiduciary-rule-under-erisa-and-new-and-amended>

<https://www.winston.com/en/blogs-and-podcasts/benefits-blast/what-is-the-current-state-of-the-u.s.-department-of-labor-erisa-fiduciary-rule#!en/who-we-are/professionals/schaefer-susan.html?aj=ov&parent=1014135&idx=1>

<https://www.winston.com/en/blogs-and-podcasts/benefits-blast/fifth-circuit-court-of-appeals-vacates-dol-fiduciary-rule>

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As part of this newly issued guidance, the Department is also proposing changes to a few legacy prohibited transaction exemptions (PTEs), including the relatively recent PTE 2020-02. At least one positive take-away from this new guidance, the Department does not appear to dilute its earlier guidance in Interpretive Bulletin 96-1, which permits plan sponsors and service providers to provide "investment education". This investment education to plan participants is still permissible without such education rising to the level of "investment advice."

**Winston Takeaway:** The Department will provide a comment window on this new guidance which will end 60 days after the proposed rule is published in the Federal Register. We will be monitoring further developments as well as collaborating with the different industry groups with respect to feedback and comments.

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